Supreme Court, U.S.
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No. 04-905

In The

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent objects to the statement of questions presented by Petitioner pursuant to S.Ct.R. 15.

The U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") stated below that "as a threshold matter Reeder had to show it was a purchaser within the meaning of the RPA [Robinson-Patman Act] . . . [w]e agree an unsuccessful bidder is not a purchaser within the meaning of the RPA . . . mere offers to sell do not violate the RPA . . . ." Pet. App. 8a, 9a.

Volvo has misstated the Eighth Circuit's true holding by asserting that the opinion holds that an unaccepted offer can violate the RPA.

Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect "may be substantially to lessen competition" was amended by Congress through the Robinson-Patman Act, in an effort to strengthen the scope of the Act, by adding the following conjunctive, alternative standard (hence the conjunction "or"): "or [where the effect may be] to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

In addition, Volvo's reasons for granting a petition for a writ of certiorari rely upon a misstatement of the relevant provisions of the RPA, by seeking to omit the provisions of the Act which provide for the ability of a plaintiff to establish an inference of competitive injury from evidence of a substantial price difference between purchasers over time, as announced in *FTC v. Morton Salt*, 334 U.S. 37 (1948).

PARTIES TO THE PROCEEDING

The Petitioner is Volvo Trucks North America, Inc., Defendant-Appellant in the courts below. The Respondent, Plaintiff-Appellee in the courts below, is Reeder-Simco GMC, Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Reeder-Simco GMC, Inc. has no parent corporation. It is a privately held corporation having only the following shareholders: David Reeder, William E. Heck and Hershel Cole.

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OPINIONS BELOW

Petitioner accurately set forth the opinions of the lower courts in its Appendix.

RELEVANT PROVISIONS

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition, . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

Petitioner omitted the "meeting competition" defense provision of the Robinson-Patman Act, which essentially renders Petitioner's argument fatally incomplete: "Nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

STATEMENT OF THE CASE

Contrary to Volvo's assertion, the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") did not "extend the reach" of the Robinson-Patman Act ("RPA"). The court relied upon settled authority consistent with its prior opinions, the decisions of other circuits, and this

Court.[1] In fact, the majority below cites with approval most of the cases claimed by the Petitioner to present a conflict.[2] It is clear that the Eighth Circuit did not create "new law," but applied the law, as announced in long-accepted precedent, to the specific facts in this case.

Petitioner's statement of the case cannot be accepted because it omits substantial evidence demonstrating the diversion of sales and profits to favored Volvo dealers, and includes the misstatement that "the alleged discrimination did not cause, and could not have caused a diversion of sales or profits to a favored purchaser." Pet. 7. To reach this conclusion, Petitioner would have the Court limit its view of the evidence to a select few of the sales transactions presented at trial. In addition, Volvo's assertion that its product pricing practices are "similar in all material respects" to Ford's pricing practices is also a misstatement.[3]

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[1] The Eighth Circuit denied Volvo's petition for rehearing and petition for rehearing en banc, in which Volvo asserted that its opinion was in conflict with its decisions in *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986); and *FTC v. Morton Salt*, 334 U.S. 37, 43 (1948). Pet. App. F. Volvo has now chosen a new set of cases on which it claims a conflict.

[2] The Eighth Circuit majority cited with approval the following: *Terry's Floor Fashions, Inc. v. Burlington Indus. Inc.*, 763 F.2d 604 (4th Cir. 1985) (Pet. App. 9a); *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 n.11 (5th Cir. 1975) (Pet. App. 9a); *Shaws, Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939) (Pet. App. 9a); and *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987) (Pet. App. 11a).

[3] Volvo cites *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) (Pet. p. 4), which is easily distinguished because in *Ford*, there was no evidence

(Continued on following page)

Stripped to its core, Volvo's true attack on the Eighth Circuit's holding is its unsupported assertion that the Eighth Circuit's conclusions on the sufficiency of the evidence are wrong. As such, it presents a purely factual issue that does not justify this Court's review. *See* Opinion, Pet. App. 7a. The factual issues were determined by a jury, and therefore can be set aside only if there is a complete absence of probative facts to support the conclusion it reached. *Id.* Accordingly, we will provide an overview of some of the pertinent evidence related to Reeder's status as a purchaser, competitive injury, and diversion of sales or profits.

Reeder's evidence of the various actual sales comparisons (in which Reeder was, in fact, a "purchaser"), involving Reeder's sales to Lane Freight, City of Fort Smith, New Hi-Way, and Sam Ludington not only establish that Reeder lost sales as a result of Volvo's price discrimination, but also that Volvo's price discrimination was substantial and existed over a period of several years. Volvo's discriminatory pricing concessions also damaged Reeder's relationship with Lane Freight, which had a 180-truck fleet, and prevented Reeder from obtaining any more sales from Lane Freight, resulting in Reeder losing profits on further sales to Lane. A. 1218-21.

Reeder presented abundant evidence that, over a four-year period, Volvo continually and repeatedly sold trucks of like kind and quality to favored dealers at substantially lower prices than those sold to Reeder, diverting sales and

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that the Ford dealer received *unequal* price concessions. In fact, the dealer conceded that the discounts were available to it on an equal basis with other Ford dealers. *Id.* at 326. Obviously, Reeder did not so concede.

lost profits from dealers like Reeder to favored dealers such as Westfall Volvo in Kansas City. For example, Reeder presented evidence that the Kansas City dealer known as "Westfall Volvo" was shown to consistently receive greater discounts than Reeder in at least five reasonably contemporaneous and comparative transactions spanning from 1996 through at least February of 1999. Tr. 159-61; Pl. Ex. 130, 131; Tr. 173-76; Pl. Ex. 124, 124B, 125, 125A; Tr. 183-85; Pl. Ex. 121, 122; Tr. 231-33; Pl. Ex. 148, 149; Tr. 253-54, 256; Pl. Ex. 174, 175, 177. The Westfall dealer in Kansas City was the dealership where Mike Truta, Reeder's "district sales manager" spent most of his time. Tr. 98. Under Volvo's system of granting discounts, the dealer initially submits his request to the district sales manager, who grants a level of discount, guided in part, upon the number of units and the particular model truck, but beyond that, the discount is determined subjectively, based only on the "district manager's discretion." A. 1531. Chris Patterson, Volvo's Vice-President of Sales and Marketing, confirmed the fact that Volvo's decentralized and subjective system of granting discounts through district sales managers does, in fact, result in a disparity of discounts among the dealers within a district. Tr. 505; Patterson Depo. pp. 99-103. Another Volvo representative stated that Volvo makes no effort to attempt to equalize the discounts among dealers, except when the same end user is identified in a transaction. Tr. 768. Reeder's representative contrasted the Volvo system to the system used by GM, where a district sales manager's discretion does *not* have an impact on discounts, and where equal availability of concessions was assured through a centralized location, without regard to a particular dealer's request for concession. Tr. 97. Volvo's representative also stated that "a very high proportion of

our trucks have been sold through a very small number of our dealers . . . making us more dependent on a smaller number of very good dealers, like . . . Kansas City . . . ." Tr. 505; Patterson Depo. p. 143.

Plaintiff showed diversion of sales and profits resulting from price discrimination by comparing Reeder's sales and profits to the sales and profits of the favored Volvo dealers. Reeder also showed that despite its increased sales efforts, Reeder's sales decreased substantially and its profit margins were lower during the period of Volvo's price discrimination (1996-2000), even though favored Volvo dealers' sales and overall market sales were strong during the same time period. Reeder's sales of Volvo trucks historically (prior to the period of price discrimination) had been good. *See* P. Ex. 268, a summary of its operating reports. A. 1360. As shown on P. Ex. 268, and as explained by Reeder's representative, total Volvo units sold per year by Reeder declined from 66 units in 1996 to only 8 units in 2000. A. 1360. Reeder's gross profits on Volvo truck sales fell from $165,499 in 1996 to $26,327 in 2000. Pl. Ex. 268; A. 1044. *See also* P. Exs. 272, 272a, 277. A. 1044-48. Reeder presented evidence that its average gross profit was lower than the average of other Volvo dealers because Reeder was not able to receive the same pricing concessions. A. 1373. Reeder also introduced various examples of lost potential sales resulting from Volvo's illegal pricing concessions that prevented Reeder from obtaining the level of concession needed to actually make the particular sale. A. 1273-1325.

Volvo's director of dealer development testified that 1998 was a good market for the sale of heavy trucks and that 1999 was Volvo Truck's "record year." A. 1340. Indeed, Volvo's senior vice-president for sales explained that the

truck market in 1999 was "inflated beyond reason" and production rates remained quite high through the third quarter of 2000. Tr. 516, Patterson Depo. p. 116. A Volvo representative testified at trial that competition in heavy truck sales has been high since 1996 and profit margins in the heavy truck business have been relatively low since 1996. A. 1620.

Reeder's representative testified that the heavy truck sales market (excluding Reeder's experience) in 1998 and 1999 was well on its way to achieving all-time record volume. A. 1357. In addition, it was taking longer for Volvo to get new orders out of the factory and the lead time between the time when a dealer ordered a truck and when the truck was built and shipped was getting longer and longer because its plant was operating at full capacity. A. 1357. During this time, competition was keen and dealer profit margins were narrow. A. 1620. Thus, the jury could find that even small differences in prices or concessions could adversely affect competition and cause lost sales and profits.

Reeder's sales efforts increased dramatically during the period of Volvo's price discrimination. In response to the "Volvo Vision," Reeder opened a new facility across the street from the dealership to be devoted exclusively to Volvo heavy truck sales and hired additional salesmen, all with the approval of Volvo. A. 1125-27. In addition, Reeder continued its efforts with respect to his established accounts. A. 1185. Indeed, Reeder presented evidence that it prepared and submitted bids to customers for the sale of over 3,300 Volvo heavy trucks from the period of mid-1997 through November 1999. Pl. Ex. 277. Despite Reeder's increased sales efforts and the fact that favored Volvo dealers were selling a record number of Volvo heavy

trucks, Reeder's sales and profit margins declined during the period of discrimination.

Moreover, Reeder presented testimony that Volvo's price discrimination actually harmed competition. The testimony of Chris Patterson, Volvo's Vice-President of Sales and Marketing, provides substantial evidence of diversion of sales from Reeder to other Volvo dealers. Volvo announced at a dealer meeting in 1997 that "50 percent of the Volvo truck dealers would not be in business in the next few years." Patterson Depo. p. 108-09. Patterson then confirmed that the "Volvo Vision," as expressed in an email distributed to the Volvo dealers (Pl. Ex. 101), was an accurate statement of the "Volvo Vision." Patterson Depo. p. 114-15. The email had a list of Volvo's challenges, which included "too many dealers" and "under performing dealers." The Volvo Vision called for "fewer dealers, larger markets." The email further indicated Volvo wanted to more than double the average market size of its dealers and decrease the number of dealer owners from 146 to 75. *Id.*, Pet. App. 3a.

Patterson explained that the Volvo Vision of reducing the number of Volvo dealers was what Volvo management saw as necessary to "secure higher levels of profitability for a dealership and for the manufacturer," due to compressed profit margins. Patterson Depo. p. 115. Patterson acknowledged that the number of dealerships was, in fact, reduced. Patterson Depo. p. 115. He testified that in 1999 or early 2000, approximately twenty "termination letters" were issued to Volvo dealers and that another "twenty or so" were placed on probation. Patterson Depo. p. 142. Significantly, Volvo sent Reeder a termination letter, effective March 31, 2000. Pl. Ex. 54; A. 1353-55. The fact that profits or sales from Reeder were diverted to favored

dealers is tied together from Mr. Patterson's statement that "a very high proportion of our trucks have been sold through a very small number of our dealers . . . making us more dependent on a smaller number of very good dealers, like . . . Kansas City . . . ." Tr. 505; Patterson Depo. p. 143.

The trial court submitted the case on special interrogatories to the jury, which was given ample evidence on which to base each of its findings, specific to the pertinent elements of the RPA, and which resulted in the judgment being entered in favor of Reeder. The Eighth Circuit opinion affirming the judgment does not conflict with any relevant precedent. Pet. App. B, C.

ARGUMENT

I. The Eighth Circuit Did Not Hold That A Mere Offer Can Violate The Robinson-Patman Act.

Volvo is simply in error when it states that the Eighth Circuit has extended the Robinson-Patman Act by "ignoring" two principles, to-wit:

(a) that "liability cannot arise from a discriminatory offer to sell that does not result in a purchase"; and,

(b) the RPA protects "competition between favored and disfavored purchasers."

Pet. 2. Petitioner's assertion is clearly a misstatement when one considers the following statements from the opinion of the Eighth Circuit: "To prove its claim, Reeder had to show 1) Volvo discriminated in price between Reeder and the favored dealers, 2) this price discrimination substantially affected competition between Reeder

and the favored dealers, ..." Pet. App. 8a. "[M]ere offers to sell do not violate the RPA" Pet. App. 9a.

> In this case, however, Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased trucks following successful bids on contracts. Reeder compared those successful sales to actual sales made by other dealers during the same time period . . . .

Pet. App. 10a.

The Eighth Circuit obviously did not "ignore" the principles that Petitioner asserts as grounds for granting certiorari. The Eighth Circuit clearly did not hold that an unaccepted discriminatory offer, without two consummated purchases at different prices, can violate the RPA. Instead, the Court accurately stated the law and applied the facts to the law in a manner that is not in conflict with any other circuit. In fact, the majority opinion cites most of the cases relied upon by the Petitioner in asserting a "conflict." Petitioner simply cannot establish that the decision of the Eighth Circuit fits any of the criteria set out in S.Ct.R. 10 so as to merit this Court granting certiorari. This Court will not grant a writ of certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct.R. 10.

The Eighth Circuit's decision plainly does not rest upon Volvo's unaccepted offers to sell alone. Nevertheless, Petitioner cites *Terry's Floor Fashions, Inc. v. Burlington*

Indus. Inc., 763 F.2d 604, 615 (4th Cir. 1985), in support of its position that the Eighth Circuit's holding is somehow in conflict with that opinion. However, the Eighth Circuit opinion actually cited *Terry's Floor Fashions*, 763 F.2d at 615, in support of its explanation that "mere offers to sell do not violate the RPA." Pet. App. 9a. Petitioner argues that because the plaintiff in *Terry's Floor Fashions* was once a purchaser of defendant's products, its holding cannot be distinguished on the basis of "Reeder's status as a purchaser." Pet. 13. The key difference between this case and *Terry's Floor Fashions* is that in *Terry's Floor Fashions*, the plaintiff "had not shown, or even alleged two comparable, completed sales." 763 F.2d at 615. Although the plaintiff in *Terry's Floor Fashions* may have shown it was a previous "purchaser" of defendant's product, it failed to compare such prior purchase to a reasonably contemporaneous sale of goods of like kind and quality to another competing purchaser. Reeder obviously alleged and presented evidence of at least four comparable completed sales, in which Reeder, and other Volvo dealers were "purchasers." As correctly stated by the Eighth Circuit: "Volvo concedes Reeder was more than an unsuccessful bidder. Reeder gave four examples where it actually purchased Volvo trucks. Reeder compared those successful sales to actual sales made by other dealers during the same time period." Pet. App. 10a.

Petitioner next contends that the Eighth Circuit's opinion is in conflict with *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). However, the Eighth Circuit also cited *M.C. Mfg. Co.* in agreement with the principle that "an unsuccessful bidder is not a purchaser within the meaning of the RPA." Pet. App. 9a. Again, the Petitioner

claims that because the plaintiffs in *M.C. Mfg. Co.* had made a prior purchase, its holding cannot be distinguished on the basis of Reeder's status as a purchaser. A conflict arises for purposes of certiorari decisions when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Stern, et al., Supreme Court Practice 226 (8th ed. 2002). Simply stated, no conflict exists between *M.C. Mfg. Co.* and the Eighth Circuit opinion below. To the contrary, *M.C. Mfg. Co.* is readily distinguishable on different facts and a different legal issue.

In *M.C. Mfg. Co.*, the plaintiff made its sole purchase from the defendant manufacturer under a June, 1970 contract, and was merely an unsuccessful bidder in connection with a December, 1971 contract (over a year and a half later). These were the only two transactions compared through evidence at trial. The plaintiff argued that because it purchased additional parts through a purchase order from the seller in furtherance of its 1970 contract, whereby the delivery of such goods would be "reasonably contemporaneous" to the delivery of goods to a rival purchaser who won the December 1971 contract, such purchase would qualify as a purchase "in competition" with the rival purchaser sufficient to implicate the RPA. The court disagreed, noting that the "legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery must be evaluated as of the dates the respective contracts were made," as opposed to delivery dates. 517 F.2d at 1066 n.13. The court also stated that, "each contract represented a separate, distinct market open only to a single producer." 517 F.2d at 1067. The court in *M.C. Mfg. Co.* was careful to note that its holding was limited to the specific facts presented,

stating, "because the particular facts underlying this case are crucial to our resolution of the controversy, a detailed review of the events leading to selection of a contractor on government contract No. [] is warranted." 517 F.2d at 1062. In addition, the court distinguished its holding from its own decision in *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951), recognizing that the specific facts presented did not conflict with the holding in *Bruce's Juices* that an exception to the two purchase requirement may exist "where competitors in the same market are engaged in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice." 517 F.2d at 1067 n.17.

It cannot be seriously disputed that Reeder was a purchaser on at least four discriminatory, comparable sales to other Volvo dealers, meeting all of the criteria to implicate the RPA. Pet. App. 2a-10a. The Eighth Circuit recognized and adhered to the law that a discriminatory offer does not violate the RPA. Petitioner's first reason for granting certiorari is without merit.

II. The Eighth Circuit Did Not Err In Holding That Reeder-Simco Presented Sufficient Evidence Of Competitive Injury Or The Likelihood Of Diverted Sales.

Distilled of rhetoric, Petitioner's second point of argument actually boils down to whether Reeder presented sufficient evidence of "competitive injury" at trial. Petitioner begins its argument by first omitting pertinent provisions of the RPA, and misstating the Eighth Circuit's holding and

analysis concerning Reeder's proof of competitive injury. Pet. 15-16. Petitioner quotes only a portion of the RPA, arguing that the RPA only protects competition "with any person who ... knowingly receives the benefit of such discrimination." Pet. 15.[4] The pertinent provisions of the RPA (highlighting the parts omitted by Petitioner) are actually stated as follows:

> (a) **Price; Selection of Customers.** It shall be unlawful for any person engaged in commerce ... either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where *either* or any of the purchases involved in such discrimination are in commerce ... *and where the effect of such discrimination may be substantially to lessen competition* ...
>
> ***or*** ...
>
> to injure, destroy or prevent competition with any person who *either grants or* knowingly receives the benefit of such discrimination, *or with customers of either of them* ....

15 U.S.C. § 13(a) (*emphasis added*).

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[4] Petitioner continues to repeat and emphasize the part of the RPA which allows for – but does not require – a showing of competitive injury by showing that the effect of discrimination may be "to injure, destroy or prevent competition with any person who ... *knowingly receives the benefit of* such discrimination." (Pet. i, 1, 8, 11, 15). Petitioner fails to cite any authority to support the notion that Reeder was required to demonstrate that another Volvo dealer knew it received the benefit of the discriminatory pricing in order to assert its claim against Petitioner Volvo. Reeder did not sue the other Volvo dealers who may or may not have known that they were receiving the benefit of Volvo's discriminatory pricing.

Thus, the Petitioner would have this Court ignore two separate, conjunctive clauses of the RPA, allowing for two, additional means of showing the prohibited "effect" of price discrimination. First, examine the meaning of "or with customers of either of them." Plainly, this refers to (1) customers of the person granting the discrimination, *and* (2) customers of the person receiving the benefit of discrimination. Here, Reeder is a "customer" of the person who grants discriminatory pricing – Volvo. The RPA therefore allows for liability upon a showing that the effect of the price discrimination "may" injure competition with *Reeder* – a "customer" of Volvo. "Fairness and protection of secondary-line purchasers are the concerns of the Robinson-Patman Act, a conclusion that is confirmed by the language of the statute, legislative history, and judicial precedent."[5] *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995). Reeder is clearly the secondary line purchaser. Volvo's focus on Reeder's customer – the end user in the "tertiary line" – is misplaced.

[5] Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect . . . "may be substantially to lessen competition . . . ," was amended by Congress through the Robinson-Patman Act, in an effort to strengthen the scope of the Act, by adding the following conjunctive, alternative standard (hence the conjunction "or"): "or [where the effect may be] to injure, destroy or prevent competition with any person who *either grants* or knowingly receives the benefit of such discrimination, *or with customers of either of them*." "The purpose of this passage was to relieve secondary-line plaintiffs – small retailers who are disfavored by discriminating suppliers – from having to prove harm to competition market wide, allowing them instead to impose liability simply by proving effects to individual competitors. H. R. Report No. 2287, 74th Cong. 2d Sess. 8 (1936). As the House Report stated: 'The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern *is injury to the competitor victimized by the discrimination*'." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995) (*emphasis added*).

Petitioner erroneously attempts to argue that the *only* method by which competitive injury may be proven is by direct evidence of diverted sales. Accordingly, it is *Petitioner* who seeks a holding inconsistent with other circuits and this Court. For example, Petitioner's argument completely ignores this Court's holding in *FTC v. Morton Salt*, 334 U.S. 37, 50, 68 S.Ct. 822, 830 (1948). In this case, the Eighth Circuit specifically found that Reeder presented sufficient evidence to meet what has become commonly known as the "*Morton Salt* inference" stating: "The evidence presented by Reeder was sufficient for the jury to conclude Volvo's discriminatory concessions resulted in lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." Pet. App. 15a. *Morton Salt* was a secondary line price discrimination case where this Court determined that the Robinson-Patman Act was "especially concerned with protecting small business," and therefore Section 2(a) was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination" (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4). "*Morton Salt* permits an inference of injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of purchasers, and thus create a 'reasonable possibility' that competition itself may be harmed." *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 142 (2d Cir. 1998).

"The existence of [actual] competition is essentially a fact question which can only be determined by making a realistic appraisal of *all* of the relevant competitive facts." *Ag-Chem Eq. Co., Inc. v. Hahn, Inc.*, 480 F. 2d 482, 490 (8th Cir. 1973), *citing FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963). The Petitioner attempts to compartmentalize the evidence of competition, separating each discriminatory transaction into a sealed container, hoping to avoid an open view of the whole picture. While Petitioner tried to emphasize the evidence of head-to-head competition (where Reeder and another Volvo dealer attempted to resell to the same exact customer at the same time) in its discussion of the "two purchase" requirement, Petitioner conveniently omits such discussion in claiming that there is insufficient evidence of injury to competition. Clearly, the evidence in this case is not limited to the events of Reeder losing sales to another Volvo dealer in "head-to-head" competition. However, such incidents are not "irrelevant" to the issue of whether Reeder established a likelihood of injury to competition. One reason for the introduction of such evidence (among substantial other evidence[6]) was to establish that Reeder and the other Volvo dealers were in actual competition with each other.

Petitioner states that "other circuits have held that a disfavored purchaser-plaintiff must prove that it competes against favored purchasers because such competition is an essential predicate for . . . competitive injury . . . ." Pet. 17. The Eighth Circuit's holding in this case is no different, as shown from the Court's pronouncement that: "To prove its

[6] For example, Volvo's representative admitted that Volvo dealers even outside a given district or region compete for sales with Volvo dealers within another district or region. Tr. 587-88.

claim, Reeder had to show (1) Volvo discriminated in price between Reeder and the favored dealers, (2) this price discrimination substantially affected competition between Reeder and the favored dealers . . . ." Pet. App. 8a. Where is the conflict? The Eighth Circuit properly stated and followed the same legal principle Petitioner claims to have been rejected by the Eighth Circuit.

The Eighth Circuit discussed substantial evidence presented by Reeder to establish actual competition, competitive injury, and the competitive nexus, which evidence more than distinguishes the cases cited by Volvo to assert a "conflict." Pet. App. 2a-20a. Contrary to Petitioner's assertion, the evidence in this case went way beyond the evidence presented in *Best Brands*, *M.C. Mfg. Co.*, *Allen Pen*, and *Stelwagon Mfg.* The shotgun approach taken by Petitioner in asserting a conflict with other opinions necessitates a response as to each case.

The Eighth Circuit's holding does not conflict with the Second Circuit's holding in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987). To the contrary, the opinion below actually quotes *Best Brands*, 842 F.2d at 585, with approval in describing the test for whether a competitive nexus was shown, as follows: "The standard for showing actual competition is whether, 'as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" *Id.* Pet. App. 11a. The Eighth Circuit applied and followed the same legal principles announced in *Best Brands*, but affirmed the judgment in favor of Reeder, finding sufficient evidence of actual competition and competitive injury, in contrast to the lack of evidence shown by the disfavored purchaser in *Best*

Brands. The distinguishing facts in *Best Brands* were succinctly described by the Second Circuit as follows:

> Best's trial evidence regarding actual competition was sparse. In fact, some evidence presented by Best seemed to contradict inferential evidence that actual competition existed. According to the weight of the evidence, the markets assigned to Best and Southland were exclusive, and neither Southland, nor Best, nor customers of either of them, engaged in competition within the other's territory. Indeed, even [in] . . . the area most susceptible to interterritory competition – *no evidence* was presented suggesting that Best, Southland, or their customers, made purchases in the other's territory, or otherwise competed therein.

Best Brands, 842 F.2d at 585 (*emphasis added*).

In contrast to the lack of evidence of actual competition shown in *Best Brands*, the Eighth Circuit discussed the substantial evidence presented by Reeder that it was in actual competition with other, but favored, Volvo dealers, including, without limitation, the situations of head-to-head competition with other dealers and from the analysis of Reeder's sales and bids compared to sales made by other Volvo dealers in the same geographic territory. Pet. App. 11a-15a.[7]

[7] In addition, unlike the *distributors*, in *Best Brands*, which have "exclusive territories," the Volvo *dealers* do *not* have exclusive territories, but may, and do sell to customers outside their district or region. Note 4, *supra*. Also, unlike many distributors, Volvo dealers *purchase* trucks for resale – they are a "customer" and not a mere conduit for distribution.

Petitioner also asserts that the opinion conflicts with the Fifth Circuit's holdings in *M.C. Mfg. Co.* (discussed *supra*), and *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), *cert. denied*, 124 S.Ct. 2881 (2004). As previously discussed, the Eighth Circuit cited *M.C. Mfg. Co.* with approval; but the result is readily distinguished on the facts, as is *Infusion Resources*. The court in *Infusion Resources* found that the plaintiff, in seeking to avoid summary judgment completely failed to submit *any* evidence that the alleged competitors of the plaintiff were "favored purchasers" at the time of the alleged price discrimination. Reeder, on the other hand, submitted substantial evidence that it did compete with favored Volvo dealers. For example, Reeder demonstrated that it competed in the same sales district as one of its rivals, Westfall Volvo, in Kansas City. Tr. A. 1221-22; A. 1571. Reeder made several comparisons of its purchases to the purchases of Westfall Volvo, where Westfall was shown to have received discriminatory prices. At trial, Reeder's representative discussed the invoices reflecting Volvo sales to Westfall Volvo, which was shown to consistently receive greater discounts than Reeder in at least five reasonably contemporaneous and comparative transactions spanning from 1996 through at least February of 1999. Tr. 159-61; Pl. Ex. 130, 131; Tr. 173-176; Pl. Ex. 124, 124B, 125, 125A; Tr. 183-185; Pl. Ex. 121, 122; Tr. 231-233; Pl. Ex. 148, 149; Tr. 253-254, 256; Pl. Ex. 174, 175, 177.[8] The Eighth Circuit agreed that the evidence presented at trial was sufficient

[8] Evidence that Volvo's discriminatory pricing caused the diversion of sales or profits to other Volvo dealers, including, for example, diversion of sales to Westfall Volvo, is briefly discussed above in Respondent's Statement of the Case; however, brevity requires the omission of additional facts.

to satisfy the *Morton Salt* inference, *and* the diversion of sales or profits caused by the discrimination.

The Petitioner next claims that the Eighth Circuit's decision conflicts with the First and Third Circuits' holdings, stating that "damages cannot be recovered for a violation of the RPA without proof that the price discrimination harmed the plaintiff's ability to compete against favored purchasers." Pet. 20. First, the Eighth Circuit did *not* hold that damages can be recovered without evidence of actual injury. Petitioners position is, again, a misstatement, in light of the evidence discussed above, and under the Eighth Circuit's analysis of the evidence and clear conclusion that "here, there was sufficient evidence from which the jury could infer favored dealers received lower prices from Volvo than did Reeder, and this price advantage allowed other dealers to undercut Reeder's prices, hurting Reeder's sales and profits." Pet. App. 19a.

Petitioner first cites *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), in which the question was whether a private plaintiff was required to show actual injury to recover damages. The First Circuit quoted this Court's holding in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), that a private treble damage plaintiff "must make some showing of actual injury attributable to a violation of the RPA." 653 F.2d at 22. The Eighth Circuit clearly followed the same principles of law as set forth in *Allen Pen* and described the substantial evidence – both direct and circumstantial – which plainly distinguishes this case factually from the insufficient evidence presented in *Allen Pen*. The Eighth Circuit also followed and cited *J. Truett Payne*, correctly stating that the law required Reeder to "make some

showing of actual injury to itself to recover treble damages." Pet. App. 17a.

In *Allen Pen*, the defendant argued that the purchaser produced no evidence from which a jury could conclude that it was injured by the price discrimination. The court agreed, finding the following facts particularly significant (653 F.2d at 21-23):

> (a) the purchasers total purchases from the seller "amounted to no more than 1½ to 2% of [the purchasers] total sales" – "the affected sales were but a tiny fraction of its total business";
>
> (b) the purchaser showed no absolute drop in sales; and,
>
> (c) the purchaser remained free to buy similar products from the seller's competitors.

In our case, however, Reeder established that heavy truck sales were a very important component of its overall sales. Instead of the 1½ to 2% in *Allen Pen*, Volvo heavy truck sales amounted to approximately twenty percent (20%) of Reeder's overall sales at the beginning of Volvo's discriminatory practices. Tr. 320-36. Also, during the time period in which the discriminatory conduct occurred, Reeder's overall sales decreased substantially and its profit margins were lower than from before such conduct, in contrast to favored Volvo dealer's record sales and higher profit margins (A. 1360, A. 1044, A. 1340, A. 1357, A. 1370-74, Tr. 516, A. 1185, A. 1125-27); and Reeder's average gross profit was lower than the average Volvo dealer's gross profit because Reeder was not able to receive the same pricing concessions (A. 1373). While the plaintiff purchaser in *Allen Pen* could readily purchase office supplies from other

suppliers, Reeder relied upon Volvo exclusively for its heavy truck sales. The Eighth Circuit discussed substantial additional evidence in the opinion reasoning that Reeder did prove actual injury. Pet. App. 14a-20a.

Petitioner incorrectly claims that the Eighth Circuit's opinion is in conflict with the Third Circuit's opinion in *Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996). Once again, the Eighth Circuit opinion does not adopt any principle of law in contrast to the Third Circuit, but is faced with the application of facts clearly distinguishable from the *Stelwagon Mfg.* case.

In *Stelwagon Mfg.*, the court found that the evidence presented at trial was insufficient to show a causal link between the plaintiff's decline in sales and the price discrimination. In fact, the only evidence submitted by the plaintiff in *Stelwagon Mfg.* linking the Robinson-Patman violation to any decline in sales or profits was anecdotal testimony that should have been ruled inadmissible. The court noted that "[n]ot only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale prices, it also failed to identify a single lost customer." 63 F.3d at 1276. The evidence in *Stelwagon Mfg.* is sharply contrasted to the evidence in this case, where Reeder presented substantial documentary evidence on its lost sales and decreased profit margins, in comparison to the increase in sales and higher profit margins of the favored Volvo dealers (discussed *supra*, pp. 3-8). Reeder presented substantial evidence on specific incidences of lost sales due to the discriminatory prices charged by Volvo. As recognized by the Eighth Circuit, "Reeder presented evidence that its own sales and profits were substantially reduced during this boom in the heavy

truck industry despite an increase in its own sales efforts." Pet. App. 18a. The Eighth Circuit's opinion is entirely consistent with this Court's explanation of the required burden of proof of causation under Section 4 of the Clayton Act as follows:

> In the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs.

J. Truett Payne Co. Inc. v. Chrysler Motors Corp., 451 U.S. 557, 565-66 (1981).

A primary flaw in Petitioner's argument is that it misconstrues or ignores the substantial evidence that Volvo's discrimination in prices did, in fact, cause the diversion of sales and profits to favored dealers. The Petitioner proceeds with its argument as if there is a complete absence of evidence of diversion of sales or profits, which is absolutely not the case. The evidence in this case showed that Volvo's practice completely eliminated Reeder's ability to compete against favored purchasers in that Reeder's franchise with Volvo was terminated. Tr. 332.

The RPA prohibits price discrimination between two purchasers, regardless of the identity of the purchaser's customer or "end user," as long as the sales to such purchasers are "reasonably contemporaneous," and the products sold are of "like grade and quality." Nevertheless, Petitioner adopts Judge Hansen's dissent, which would

impose a new requirement of purchasers having *identical* customers, at the exact same time, instead of the accepted and logical requirement of similar group of customers (i.e. the same "customer *dollar*," not "same customer"), at "reasonably contemporaneous" times. Petitioner's argument and approach conflicts with the accepted analysis of actual competition from established precedent and overlooks the purpose and practicality of the "meeting competition" defense available under § 2(b) of the RPA.

The Federal Trade Commission and this Court have concluded that the RPA has a primary basis on one fundamental principle: "Congress intended to assure, to the extent reasonably practicable, that businessmen at the *same functional level* would start on *equal* competitive footing so far as price is concerned." *In re Boise Cascade Corp.*, 107 F.T.C. 76, 205 (1986), *quoting FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). Obviously, as retailers engaged in the sale of Volvo heavy trucks, the favored Volvo dealers and Reeder competed on the same functional level. *See Eastern Auto Distributors v. Peugeot Motors Amer.*, 795 F.2d 329, 335 (4th Cir. 1986). It is established and recognized by overwhelming authority that once a plaintiff makes a showing that it competes on the same functional level, the next inquiry is whether the competitors also compete in the same geographic territory – an element beyond dispute in this case. *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987). The RPA says absolutely nothing about the concept that the customers must be *identical*, nor is it found in any legislative history of the Act. It is not surprising that neither Volvo, nor Judge Hansen, in the dissent, cite any authority directly requiring the secondary line purchasers (Reeder and other Volvo dealers) be involved in a sale to

the exact same customer. The Eighth Circuit's opinion cannot possibly conflict with non-existent contrary authority. In fact, the overwhelming authority holds that the plaintiff needs to show only that the sales were "reasonably contemporaneous." *See FTC v. Bordon Co.*, 383 U.S. 637, 643-44 (1966); *Black Gold Ltd. v. Rockwool Indust., Inc.*, 729 F.2d 676, 683 (10th Cir. 1984); *Zwicker v. J. I. Case Co.*, 596 F.2d 305, 309 (8th Cir. 1979); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572 (N.D. Ga. 1992).

It has been repeatedly recognized that "determining the presence or absence of functional competition between purchasers of a commodity is simply a factual process which focuses on whether these purchasers were directly competing for resales among the same *group* of customers." *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 141 (2d Cir. 1998); *see Texaco, Inc. v. Hausbrouck*, 496 U.S. 543, 554 (1990). The fact that Reeder and other Volvo dealers were involved in competitive bidding situations does not change the fact that they were continually after the same customer dollar from the same *group* of customers – end users of heavy duty trucks. It defies logic to impose a requirement of showing that Reeder and another Volvo dealer must be attempting to sell to the *exact same* customer, when accepted precedent provides that the RPA is implicated when there are reasonably contemporaneous sales ("exactly contemporaneous" sales are not required), and that the sales must involve products of "like grade and quality" (not the "same" product). Volvo's argument "writes out of the statute the requirement of 'reasonably contemporaneous sales' and 'like grade and quality,' and writes into the law a requirement that the plaintiff prove 'coincidental sales or

bids' of the 'exact same products.' This Court has already rejected the equivalent of [Volvo's] 'equalization' defense outright." James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1, p. 113, *citing Texaco, Inc. v. Hausbrouck*, 496 U.S. 543, 556-58 (1990).

Volvo essentially claims, without citation or authority, that the RPA is simply inapplicable to all competitive bidding situations. The problem with Volvo's argument is apparent when one considers the "meeting competition" defense, which was available to Volvo at trial, but which was rejected by the jury. The meeting competition defense is established for the purpose of competitive bidding situations, and allows a defendant such as Volvo to avoid liability where it can show that its lower price "to *any* purchaser *or* purchasers was made in good faith to meet an equally low price of a competitor ...." 15 U.S.C. § 13(b). If "actual competition" is defined so as to *never* include the situation of competitive bidding, then the "meeting competition" defense becomes mere legislative surplusage. Clearly, the RPA actually addresses competitive bidding situations by including the meeting competition defense.

Petitioner's essential argument was also addressed in *Industrial Burner Systems, Inc. v. Maxon Corp.*, 275 F. Supp. 878, 886 (E.D. Mich. 2003), in which the court criticized the case of *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), stating:

> [T]his approach unnecessarily blends the "separate purchaser" requirement found in the second price discrimination factor, with the competitive injury requirement found in the fourth factor. More importantly, this interpretation overlooks the practical impact of the competition in the bidding process – the relevant competitive market – by focusing on the after-the-matter "purchase." In a bid-contract structure, this purchase is, for the purposes of the competition for the bid, a second symbolic purchase.

The *Maxon* court pointed out additional reasons for distinguishing the *M.C. Mfg.* case, which are equally applicable here, and importantly pointed out that the loss to the unfavored purchaser is not limited to the situation where such purchaser has made an after-the-matter "purchase" of the components. *See also Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653 (9th Cir. 1997), *cert. denied*, 522 U.S. 943 (1997).

Petitioner's argument is premised entirely on the unsupported assertion that "actual competition" means that Reeder and the other Volvo dealers with which it competes must be bidding for the same customer on the same truck to trigger the Act's protection. Any such requirement would open a vast loophole in the RPA. It would enable a manufacturer of any product to establish different pricing schemes for different dealers, similarly situated, with impunity; so long as Dealer A (the disfavored dealer) could not point to customers who actually shopped among those dealers – including both Dealer A and Dealer B – and chose to buy a given unit from Dealer B who received a lower price from the manufacturer, there would be no RPA violation. The result would clearly be to lessen competition, because Dealer A would be driven out of business. Dealer A would be without customers, solely because of the discriminatory pricing. Yet, according to Volvo, all this is perfectly proper. But, as we have shown, and as the Eighth Circuit correctly holds, this is not the law.

This point is well made by James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1 (Jan. 2002), where the author states:

> Where price discrimination is allowed to take place, suppliers who sell to retailers can dictate which retailers get lower prices and which pay higher prices. Over time, such favoritism will eventually put the disfavored retailers out of business, all the while harming the disfavored buyers' customers who are often paying higher prices than they otherwise would. The disfavored retailers go out of business because they cannot forever resell at the same low price as the favored retailers. The market is then left with a monopolist in charge of supply.

Id. at 17. That is exactly what Volvo seeks.

III. The Eighth Circuit's Opinion Will Not Be Harmful To Competition.

Petitioner argues that the effect of the decision in the instant case will be to reduce competition and result in higher prices because manufacturers will choose to establish uniform prices which will be higher than if they can "selectively" discount their competitive bids. This argument conflicts with Volvo's admission at trial, where Volvo's Vice-President of the Southeast Region said that Volvo's discounting methodology is used because it allows Volvo to sell at a higher profit to someone who will pay more. (Tr. 763) Volvo simply wants to be able to engage in discriminatory pricing for the sake of its own profits – not for "consumer welfare." Nothing in the RPA or the Eighth Circuit opinion prohibits a seller from offering its products at different prices to different buyers, so long as the reason

for such difference is legitimate (e.g., "cost justification" or "meeting competition").

Volvo's final argument not only ignores the availability of the "meeting competition" defense, but also seeks a judicially active determination neutralizing the purpose and intent of the RPA. Such would be contrary to the division of labor between Congress and the Court.[9] The purpose of the RPA, as determined from legislative history, has been described as follows:

> Now there are some people that think that in order to have competition, you need a few competitors. Not only do a few people think this, but this is also the opinion of the people that wrote the [Robinson-Patman] Act in the first place. The Judiciary Committee report states: "Existing laws [referring to the Sherman and Clayton Acts] have been too restrictive in requiring a showing of injury to competitive conditions in the line of commerce involved; whereas the more immediately important concern is an injury to a competitor victimized by the discrimination. Only through such injury, in fact, can the larger general injury result and that is the key." . . . There has to be some protection for competitors if, in fact, you are going to have competition. Otherwise, there's nobody left to compete.

Jerry S. Cohen, *Let's Retain It*, 45 Antitrust Law J. 44, 48 (1976).

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[9] As noted by this Court in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 569 n.27 (1990): "Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes, and are not free to consider whether, or how, the statute should be rewritten."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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